

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





74-2177

~~T-3839~~

B  
D/S

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United States Court of Appeals  
FOR THE SECOND CIRCUIT

Docket No. T-3839

In the Matter  
of  
KINGSBORO MORTGAGE CORPORATION,  
*Bankrupt.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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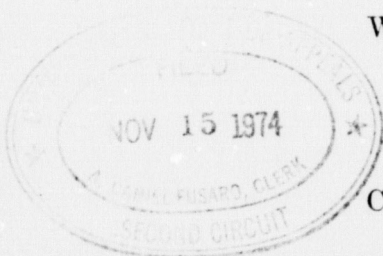
JOINT APPENDIX

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**Motion of Bankers Life Company, Appellee**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy No. 69B20

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In the Matter

of

KINGSBORO MORTGAGE CORPORATION,

*Bankrupt.*

---

Bankers Life Company (Claim No. 1) hereby moves, upon the annexed affidavit of William E. Kelly, sworn to March 19, 1973, for an order that the claims filed by Manufacturers Hanover Trust Company, Northwestern Life Insurance Company and Farm Bureau Life Insurance Company (Claims Nos. 5, 44 and 43, respectively) based upon Senior debt be disallowed or, in the alternative, be subordinated, to the extent that such claims seek interest for any period after the date of the filing of the petition in bankruptcy, January 13, 1969, to the payment of the claim filed by Bankers Life Company (Claim No. 1) based upon Subordinated Debt until Bankers Life Company has received payment in full of the unpaid balance of principal on its claim with interest thereon to January 13, 1969, in the total amount of \$1,881,075.

Dated: New York, New York  
March 19, 1973

CASEY, LANE & MITTENDORF

WILLIAM E. KELLY

By .....  
A Member of the Firm  
Attorneys for Bankers Life Com-  
pany (Claim No. 1)  
Office and Post Office Address  
26 Broadway  
New York, New York 10004  
Tel.: (212) Whitehall 3-3000

**Affidavit of William E. Kelly in Support of  
Motion of Bankers Life Company**

[SAME TITLE]

STATE OF NEW YORK    }  
COUNTY OF NEW YORK } ss.:

WILLIAM E. KELLY, being duly sworn, deposes and says that he is a member of the firm of Casey, Lane & Mitten-dorf, attorneys for Bankers Life Company (Claim No. 1) "Bankers Life") in this proceeding, that he is fully familiar with the facts and relevant proceedings herein, and that he makes this affidavit in support of Bankers Life's motion for an order disallowing certain claims based upon Senior Indebtedness, or, alternatively, subordinating those claims to the extent that those claims seek interest for any period after the date of bankruptcy, January 13, 1969, to Bankers Life's claim which is based upon Subordinated Indebtedness.

1. A petition under Chapter XI of the Bankruptcy Act was filed herein by Kingsboro Mortgage Corporation ("Kingsboro") on January 13, 1969. Thereafter, on February 27, 1969, Kingsboro was adjudicated a bankrupt. Kingsboro had been in the business of real estate mortgage financing and managed various parcels of property owned by it.

2. Bankers Life filed a claim in the amount of \$1,881,075 for the unpaid balance of principal due on two 5¾% Subordinated Notes issued by Kingsboro due April 1, 1976, plus interest thereon through the date of the filing of the petition, January 13, 1969. A copy of Bankers Life's claim is annexed hereto as "Exhibit A" and copies of the Subordinated Notes upon which it is based are annexed hereto as "Exhibit B" and "Exhibit C", respectively.

*Affidavit of William E. Kelly in Support of  
Motion of Bankers Life Company*

3. The aforesaid Subordinated Notes ("Exhibit B" and "Exhibit C") were issued pursuant to an agreement, dated April 17, 1964, between Kingsboro and Bankers Life. A copy of the agreement is annexed hereto as "Exhibit D".

4. On June 2, 1970, the trustee in bankruptcy, Howard F. Sunshine, moved for an order subordinating Bankers Life's claim, and the claims of Northwestern Life Insurance Company and The Paul Revere Life Insurance Company (Claims Nos. 3 and 6, respectively) which are based on Junior Subordinated Notes, to the claims of Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company (Claims Nos. 5, 44 and 43, respectively) ("the Senior Creditors"). The Senior Creditors are claiming approximately \$6,450,000 in principal and interest through the date of the filing of the petition, January 13, 1969, and are also claiming interest for the period from January 13, 1969 through the actual date of payment ("post-petition interest"). Although the trustee's motion requested subordination of Bankers Life's claim to not only the amount of the Senior Creditors' claims through the date of the filing of the petition but also to post-petition interest on those claims as well, that motion was amended, at Bankers Life's request, to exclude post-petition interest. Thus, on July 20, 1970, the Referee in Bankruptcy, Honorable Edward J. Ryan, ordered Bankers Life's claim, as well as the claims of the Junior Subordinated Noteholders, Subordinated to the claims of the Senior Creditors to unpaid principal and interest through the date of the filing of the petition. Referee Ryan's order also provided that it was without prejudice to a future application by the trustee for an order subordinating Bankers Life's claim to the claim

*Affidavit of William E. Kelly in Support of  
Motion of Bankers Life Company*

of the Senior Creditors to post-petition interest. A copy of Referee Ryan's order of July 20, 1970 is annexed hereto as "Exhibit E".

5. Since July 20, 1970, the trustee has been managing and disposing of the bankrupt estate. Upon information and belief, the Senior Creditors have now almost been paid the amount of their claims to principal and interest through the date of the filing of the petition. The issue now arises as to whether Bankers Life is now entitled to have its claim paid or whether the Senior Creditors' claim to post-petition interest will be paid next and, for that reason, Bankers Life moves for an order subordinating the claims of the Senior Creditors to post-petition interest to Bankers Life's claim for payment of principal and interest through the filing of the petition in bankruptcy.

6. The claim of the Senior Creditors to the priority of post-petition interest is based upon paragraph 12(b) of the agreement of April 17, 1964 ("Exhibit D", at p. 10) which provides:

“(b) In the event of any insolvency bankruptcy, liquidation, reorganization, or other similar proceedings, or any receivership proceedings in connection therewith, relative to the Company or its creditors or its property, and in the event of any proceedings for voluntary liquidation, dissolution or other winding up of the Company, whether or not involving insolvency or bankruptcy proceedings, then all principal and interest on all Superior Debt shall first be paid in full, or such payment shall have been provided for, before any payment on account of principal or interest is made upon the Notes.”

7. Deponent respectfully submits that this provision does not attempt to change the general policy in bank-



*Affidavit of William E. Kelly in Support of  
Motion of Bankers Life Company*

ruptcy that interest ceases as of the date of the filing of a petition in bankruptcy. To permit the Senior Creditors to collect not only the full amount of their debt and interest to the date of the filing of the petition, but also post-petition interest would be to violate a cardinal rule of bankruptcy, that equality of treatment in the distribution of assets should not be affected by delays in the winding up of the bankrupt's estate. The Senior Creditors have already obtained the full benefit of their senior position by obtaining the full amount of their principal plus interest to the date of the filing of the petition and also by receiving that amount well in advance of any amounts received by Bankers Life or the Junior Subordinated Creditors. Furthermore, to permit the Senior Creditors to recover post-petition interest would penalize Bankers Life for the length of time that it has taken to wind up Kingsboro's affairs, a result which would be inequitable to say the least.

8. Thus, in conclusion, given the overriding policy underlying the Bankruptcy Law and given the substantial benefits which have already accrued to the benefit of the Senior Creditors, deponent believes that the claim of the Senior Creditors to post-petition interest should be disallowed or, alternatively, should be subordinated to Bankers Life's claim.

WHEREFORE, deponent respectfully urges the Court to grant Bankers Life's motion in its entirety.

WILLIAM E. KELLY

-----  
William E. Kelly

[Sworn to on March 19, 1973.]

[SAME TITLE]

STATE OF NEW YORK }  
COUNTY OF NEW YORK } SS.:

### 1. (a) *Individual*

### (b) *Co-Partnership*

That he is a member of \_\_\_\_\_ a co-partnership,  
hereinafter designated as claimant, composed of deponent  
and \_\_\_\_\_ of  
and carrying on business at No. \_\_\_\_\_  
County of \_\_\_\_\_ State of \_\_\_\_\_ (or as appears below)

That he is the Associate Counsel of Bankers Life Company, a corporation organized and existing under the laws of the State of Iowa and carrying on business at No. 711 High Street in Des Moines, County of Polk, State of Iowa, and is duly authorized to make this proof of claim on its behalf. Said corporation is hereinafter designated as the claimant.

2. That Kingsboro Mortgage Corporation, the above named Debtor was at and before the filing by (or against) said Debtor of the petition for

*Exhibit A Annexed to Affidavit of William E. Kelly  
Proof of Claim of Bankers Life Company  
Claim No. 1.*

arrangement and still is justly and truly indebted (or liable) to claimant in the sum of \$1,881,075.

3. That the consideration of said debt (or liability) is as follows:

A 5¾% Subordinated Note dated April 29, 1964 in the principal amount of \$1,300,000; a 5¾% Subordinated Note dated March 17, 1965 in the principal amount of \$500,000, plus, in each case, interest from April 1, 1968 to January 13, 1969.

4. That no part of said debtor (or liability) has been paid, except

None.

5. That there are no set-offs or counterclaims to said debt (or liability), except

None.

6. That claimant does not hold, and has not, nor has any person by claimant's order, or to deponent's knowledge or belief, for claimant's use, had or received, any security or securities for said debt (or liability), except

None.

7. That a copy of the instrument upon which said debt (or liability) is founded is attached hereto (or is lost or destroyed, as set forth in the affidavit attached hereto).

8. (If the debt is founded upon an open account) That the said debt was (or will become) due on  
(or that the average due date thereof is );

*Exhibit A Annexed to Affidavit of William E. Kelly*  
*Proof of Claim of Bankers Life Company*  
*Claim No. 1.*

that no note or other negotiable instrument has been received for such account or any part thereof (or that the said debt is evidenced by a note (or other negotiable instrument), which is attached hereto); and that no judgment has been rendered thereon, except

HERMAN T. BAILEY

[Sworn to on February 13, 1969.]



**Exhibit B Annexed to Affidavit of William E. Kelly  
Subordinated Note Payable to The Order of  
Bankers Life Company**

**KINGSBORO MORTGAGE CORPORATION**

**5¾% SUBORDINATED NOTE DUE APRIL 1, 1976**

New York, N. Y.,  
April 29, 1964

\$1,300,000

FOR VALUE RECEIVED, the undersigned, KINGSBORO MORTGAGE CORPORATION (herein called the "Company"), a corporation organized and existing under the laws of the State of New York, hereby promises to pay to the order of BANKERS LIFE COMPANY the principal sum of ONE MILLION THREE HUNDRED THOUSAND DOLLARS on April 1, 1976, with interest (computed on the basis of a 360-day year—30-day month) on the unpaid balance thereof at the rate of 5¾% per annum from the date hereof, payable semi-annually on the first day of April and October in each year, commencing with the April 1 or October 1 next succeeding the date hereof, until the principal hereof shall have become due and payable, and thereafter at the rate of 7% per annum on any overdue principal and (to the extent legally enforceable) on any overdue interest until paid.

Payments of principal, premium, if any, and interest shall be made at the principal office of the Company in New York, New York, in lawful money of the United States of America.

This Note is issued pursuant to an Agreement dated April 17, 1964 between the Company and Bankers Life Company, and is entitled to the benefits thereof. As provided in said Agreement, this Note is subject to prepayment, in whole or in part, in certain cases without premium and in other cases with a premium as specified in said

*Exhibit B Annexed to Affidavit of William E. Kelly  
Subordinated Note Payable to The Order of  
Bankers Life Company*

Agreement. The Company agrees to make prepayments of principal on the dates and in the amounts specified in said Agreement.

As provided in said Agreement, the payment of the principal of and premium, if any, and interest on this Note is subordinated to the Senior Funded Debt and Short-Term Borrowing (as defined, respectively, in said Agreement) of the Company to the extent provided in said Agreement, and the holder of this Note by acceptance hereof agrees to such subordination.

In case an event of default, as defined in said Agreement, shall occur and be continuing, the principal of this Note may be declared due and payable in the manner and with the effect provided in said Agreement.

KINGSBORO MORTGAGE CORPORATION

By (Illegible)

*President*

11a

**Exhibit C Annexed to Affidavit of William E. Kelly**

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**Subordinated Note Payable to Bankers Life Company  
is Identical with Exhibit B Except That It Is  
Dated March 17, 1965 and is in The Sum of \$500,000.**

**Relevant Parts of Exhibit D Annexed to the  
Affidavit of William E. Kelly**

[Conformed Copy]

SUBORDINATION AGREEMENT

PURCHASE AGREEMENT

**KINGSBORO MORTGAGE CORPORATION**  
**5¾% SUBORDINATED NOTES DUE APRIL 1, 1976**

April 17, 1964

BANKERS LIFE COMPANY  
711 High Street  
Des Moines 7, Iowa

*Attention: Investment Department, Securities Division*

Dear Sirs:

KINGSBORO MORTGAGE CORPORATION (herein called the "Company"), a New York corporation, agrees with you as follows:

1. Authorization of Notes. The Company will authorize the issue of \$1,300,000 principal amount of its 5¾% Subordinated Notes due April 1, 1976, to be dated the date of delivery and to be substantially in the form of Exhibit A hereto (herein, together with any Notes which may be issued in substitution therefor or replacement thereof, called the "Notes").

2. Sale and Purchase of Notes. The Company will sell to you and, subject to the terms and conditions hereof and in reliance upon the representations and warranties of the Company contained herein, you will purchase from the Company, Notes in the principal amount of \$1,300,000 at the purchase price of 98.35% of the principal amount thereof.



*Relevant Parts of Exhibit D Annexed to the  
Affidavit of William E. Kelly*

3. Closing. The closing hereunder shall take place at the offices of New York Securities Co., 52 Wall Street, New York, New York, at such time (during normal business hours) and on such business day prior to May 15, 1964, as the Company shall designate by at least six days prior written notice to you. At the closing the Company will deliver the Notes purchased by you in the form of a single Note payable to your order (or to the order of any nominee specified by notice to the Company given by you or your special counsel at least two business days prior to the closing), against payment of the purchase price therefor by a certified or bank cashier's check in New York Clearing House funds. If at the closing the Company shall fail, as herein provided, to tender the Notes to you or if at the closing any of the conditions specified in section 7 hereof shall not have been fulfilled to your satisfaction, you will, at your option (without thereby waiving any rights you may have in respect of such failure or non-fulfillment), be relieved of all obligations under this Agreement.

4. Definitions. As used herein, the following terms have the following respective meanings:

4.1. "*Consolidated Liquid Net Worth*" means the book value of all of the issued and outstanding capital stock of the Company less (a) any fixed assets (excluding real property acquired through foreclosures of mortgages or other collateral interests which are held in the ordinary course of business), (b) goodwill, trademarks, trade names, licenses and all other intangible assets of like nature and (c) any prepaid expenses (excluding prepaid interest) or deferred charges, underwriting commissions and expenses, loans and advances to directors, officers or employees and investments other than (i) in prime commercial paper due

*Relevant Parts of Exhibit D Annexed to the  
Affidavit of William E. Kelly*

within one year from date of purchase and direct obligations of the United States Government or any agency thereof or (ii) loans receivable which were made in the ordinary course of business (all of the foregoing items to be determined on a consolidated basis by generally accepted accounting principles applied on a basis consistent with the principles applied in the preparation of the financial statements referred to in subsection 5.3 hereof).

4.2. "*Consolidated Net Income*" means consolidated gross revenues of the Company and its Subsidiaries less all operating and non-operating expenses of the Company and its Subsidiaries, including all charges of a proper character (including current additions to reserves and taxes on income), but not including in gross revenues any gains in excess of losses resulting from the sale, conversion, or other disposition of capital assets (i.e., assets other than current assets) or any gains resulting from the write-up of assets, all determined in accordance with generally accepted accounting principles on a consolidated basis.

4.3. "*Funded Debt*" of any corporation means all Indebtedness of such corporation maturing more than twelve months from the date of creation thereof or directly or indirectly renewable or extendible beyond such twelve months, at the option of the debtor, by its terms or by the terms of any instrument or agreement relating thereto, and all Indebtedness (regardless of its maturity) of such corporation incurred under a revolving credit or similar agreement if such Indebtedness is extendible pursuant to its terms or the terms of such agreement for more than twelve months after the date of its creation. Amounts required to be paid or prepaid prior to the expiration of twelve months from the date of creation of any such Indebtedness

*Relevant Parts of Exhibit D Annexed to the  
Affidavit of William E. Kelly*

the balance of which matures beyond such twelve months shall constitute Funded Debt for purposes of the foregoing.

4.4. "*Indebtedness*" of any corporation means (a) all indebtedness, obligations and liabilities, which, in accordance with generally accepted accounting principles, would be classified as liabilities on the balance sheet of such corporation or for which, in accordance with such principles, a reserve would be set up on such balance sheet, (b) all guarantees, endorsements (other than for collection or deposit in the ordinary course of business) and other contingent obligations to purchase or otherwise acquire or become liable upon or in respect of, or to supply or advance funds on account of, any indebtedness, obligations or liabilities of others, and (c) any obligation or liability secured by any mortgage, pledge or lien existing on property owned subject thereto whether or not such obligation or liability shall have been assumed. The amount of any such contingent obligation shall be considered Indebtedness of the contingent obligor equal to the full amount payable by the contingent obligor upon the happening of the contingency in question.

4.5. "*Junior Subordinated Debt*" means any Funded Debt of the Company, representing Indebtedness for borrowed money, which

(i) has a final maturity on or subsequent to April 1, 1976; and

(ii) by its terms is subordinated to the Notes and to any other Subordinated Debt of the Company, and to the Senior Funded Debt and the Short Term Borrowing of the Company, in substantially the same manner and to substantially the same extent that the



*Relevant Parts of Exhibit D Annexed to the  
Affidavit of William E. Kelly*

Notes are subordinated to the Senior Funded Debt and the Short Term Borrowing of the Company pursuant to the provisions of section 12 hereof.

4.6. "*Person*" means and includes an individual, a partnership, a corporation, a trust, an unincorporated organization and a government or any department or agency thereof.

4.7. "*Senior Debt*" has the meaning specified in section 12 hereof.

4.8. "*Senior Funded Debt*" means all Funded Debt of the Company constituting Indebtedness for borrowed money, other than Subordinated Debt and Junior Subordinated Debt.

4.9. "*Short Term Borrowing*" of any corporation means all Indebtedness for borrowed money which does not constitute Funded Debt.

4.10. "*Subordinated Debt*" means the Notes and any other Funded Debt of the Company ranking equally with the Notes which by its terms is subordinated to the Senior Funded Debt and the Short Term Borrowing of the Company in the same manner and to the same extent that the Notes are subordinated thereto pursuant to the provisions of section 12 hereof. The term "*Subordinated Debt*" does not include Junior Subordinated Debt.

4.11. "*Subsidiary*" means any corporation organized under the laws of any state of the United States of America, Canada, or any province of Canada, which conducts the major portion of its business in the United States of America or Canada, and all of the stock of every class of which, except directors' qualifying shares, shall, at the time

*Relevant Parts of Exhibit D Annexed to the  
Affidavit of William E. Kelly*

as of which any determination is being made, be owned by the Company either directly or through Subsidiaries.

\* \* \* \* \*

12. Subordination to Senior Debt. Anything herein or in the Notes to the contrary notwithstanding, the Indebtedness evidenced by the Notes shall be subordinate and junior to the extent set forth in the following paragraphs (a) to (e), inclusive, to all Senior Funded Debt and Short Term Borrowing of the Company, whether outstanding at the date of this Agreement or created or incurred after the date of this Agreement but prior to the maturity of the Notes by lapse of time, acceleration or otherwise. Such Senior Funded Debt and Short Term Borrowing of the Company to which the Notes are subordinate and junior is sometimes herein referred to as "Senior Debt."

(a) No payment on account of principal or interest shall be made on the Notes so long as the Company is in default in the payment of principal of or interest on any Senior Debt, whether due at maturity or by acceleration or otherwise.

(b) In the event of any insolvency, bankruptcy, liquidation, reorganization or other similar proceedings, or any receivership proceedings in connection therewith, relative to the Company or its creditors or its property, and in the event of any proceedings for voluntary liquidation, dissolution or other winding up of the Company, whether or not involving insolvency or bankruptcy proceedings, then all principal and interest on all Senior Debt shall first be paid in full, or such payment shall have been pro-

*Relevant Parts of Exhibit D Annexed to the  
Affidavit of William E. Kelly*

vided for, before any payment on account of principal or interest is made upon the Notes.

(c) In the event that the Notes are declared due and payable before their expressed maturity because of a default hereunder (under circumstances when the provisions of the foregoing paragraph (b) shall not be applicable) or a demand for prepayment of any Note is made pursuant to subsection 11.4 hereof, the holders of Senior Debt outstanding at the time the Notes so become due and payable or at the time such demand for prepayment is made, as the case may be, shall be entitled to receive payment in full of all principal and interest on all such Senior Debt before the holders of the Notes are entitled to receive any payment on account of the principal or interest upon the Notes; provided that with respect to Senior Debt constituting Senior Funded Debt this paragraph (c) shall not apply in respect of any such event and shall not prevent any payment on the Notes subsequent to 90 days after the date upon which the holders of such Senior Debt (which are not bearer obligations) shall have received written notice of such default and acceleration or of such demand, as the case may be, from the Company and/or one or more of the holders of the Notes.

(d) In any of the proceedings referred to in paragraph (b) above, any payment or distribution of any kind or character, whether in cash, property, stock or obligations which may be payable or deliverable in respect of the Notes shall be paid or delivered directly to the holders of Senior Debt for application

*Relevant Parts of Exhibit D Annexed to the  
Affidavit of William E. Kelly*

in payment thereof, unless and until all principal and interest on all Senior Debt shall have been paid in full, or payment thereof in cash shall have been provided for, provided that (i) this subparagraph (d) is subject to the power of a court of competent jurisdiction to make other equitable provision reflecting the rights conferred herein upon the Senior Debt and the holders thereof with respect to the subordinate Indebtedness represented by the Notes and the holders thereof by a lawful plan of reorganization under any applicable bankruptcy or reorganization law; and (ii) no such delivery shall be made to holders of Senior Debt of stock or obligations which are issued pursuant to reorganization proceedings, or upon any merger, consolidation, sale, lease, transfer or other disposal not prohibited by the provisions of this Agreement, by the Company, as reorganized, or by the corporation succeeding to the Company or acquiring its property and assets, if such stock or obligations are subordinate and junior at least to the extent provided in this section 12 to the payment of all Senior Debt then outstanding and to the payment of any stock or obligations which are issued in exchange or substitution for any Senior Debt then outstanding.

(e) For the purposes of paragraphs (b) and (d) of this section 12, a payment or delivery to an authorized representative of any holders of Senior Debt, or to a trustee under any indenture or agreement under which any Senior Debt is outstanding, in trust for the benefit of the holders of such Senior Debt (to be applied ratably according to the aggre-



*Relevant Parts of Exhibit D Annexed to the  
Affidavit of William E. Kelly*

gate amounts remaining unpaid on account of the principal, premium, if any, and interest on the Senior Debt represented by each holder thereof and in accordance with any priorities existing among such holders), shall be deemed received by the holders of such Senior Debt and the holders of the Notes may rely on a certificate of any such representative or trustee for the purpose of determining the respective amounts to which the holders of such Senior Debt are respectively entitled.

The provisions of this section 12 are for the purpose of defining the relative rights of the holders of Senior Debt on the one hand, and the holders of the Notes on the other hand, against the Company and its property and nothing herein shall impair, as between the Company and the holder of any Note, the obligation of the Company, which is unconditional and absolute, to pay to the holder thereof the principal, premium, if any, and interest thereon in accordance with its terms and the provisions hereof; nor shall anything herein prevent the holders of the Notes from exercising all remedies otherwise permitted by applicable law or hereunder upon default hereunder or under the Notes, subject to the rights, if any, under this section 12 of holders of Senior Debt to receive cash, property, stock or obligations otherwise payable or deliverable to the holders of the Notes. Nothing contained in this section 12 shall limit or otherwise affect, as between the Company and the holders of the Notes, the obligations of the Company to perform all its covenants in this Agreement including, without limitation, the provisions of section 14 hereof.

\* \* \* \* \*



*Relevant Parts of Exhibit D Annexed to the  
Affidavit of William E. Kelly*

31. Law Governing. This Agreement and the Notes are being executed and delivered in the State of New York, and this Agreement shall be construed in accordance with and governed by the laws of such State.

32. Modifications. The terms and provisions of this Agreement may not be modified or amended except in writing.

\* \* \* \* \*

If you are in agreement with the foregoing please sign the form of acceptance on the enclosed counterpart of this letter and return such counterpart to the undersigned, whereupon this letter shall become a binding agreement between you and the undersigned.

Very truly yours,

KINGSBORO MORTGAGE CORPORATION

By JULIUS BLANKSTEIN  
*Executive Vice President*

The foregoing agreement is  
hereby accepted as of the  
date first above written.

BANKERS LIFE COMPANY

By J. T. DAVES  
*Financial Secretary*

**Exhibit E Annexed to the Affidavit of William E. Kelly****UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****[SAME TITLE]****ORDER SUBORDINATING CLAIMS**

The Trustee having moved this Court for an order subordinating payment of the claims filed herein by Subordinated and Junior Subordinated Creditors to the payment of the claims filed by Senior Creditors with interest to date of payment, and said motion having regularly come on to be heard,

Now, upon the application of Howard F. Sunshine, Trustee herein, dated the 2nd day of June 1970, the notice of motion thereon, dated June 2, 1970, the affidavit of service on file herein and after hearing Weisman, Celler, Allan, Spett & Sheinberg, in support of said motion and no one having appeared in opposition thereto and due deliberation having been had, it is on motion of Weisman, Celler, Allan, Spett & Sheinberg

ORDERED, ADJUDGED AND DECREED that the claim of Bankers Life Company (Claim No. 1) based upon Subordinated Debt be subordinated to the payments of the claims filed by Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company (Claim Nos. 5, 44 and 43) based upon Senior Debt until the said Senior Creditors have received payment in full of the unpaid balance of principal on said Senior Debt with interest thereon to January 13, 1969, and it is further

ORDERED, ADJUDGED AND DECREED, that any distribution or dividends to which the said Bankers Life Company may

*Exhibit E Annexed to the Affidavit of William E. Kelly*

be entitled to receive from this estate on its claim (Claim No. 1) shall be paid to Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company pro rata according to their respective claims filed herein (Claim Nos. 5, 44 and 43) until the said Senior Creditors have received full payment of the unpaid balance of principal on said Senior Debt with interest thereon to January 13, 1969; and it is further

ORDERED, ADJUDGED AND DECREED, that the claims of Northwestern Life Insurance Company and The Paul Revere Life Insurance Company (Claim Nos. 3 and 6) based upon Junior Subordinated Debt be subordinated to the payment of the claims filed by Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company (Claim Nos. 5, 44 and 43) based upon Senior Debt and the claim of Bankers Life Company (Claim No. 1) based upon Subordinated Debt (Senior and Subordinated Debt is referred to as Superior Debt) until the unpaid balance of principal on said Superior Debt has been paid in full with interest thereon to January 13, 1969; and it is further

ORDERED, ADJUDGED AND DECREED, that any distributions or dividends the said Northwestern Life Insurance Company and The Paul Revere Life Insurance Company may be entitled to receive on their claims based upon Junior Subordinated Debt (Claim Nos. 3 and 6) shall be paid to Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company pro rata according to their claims filed herein (Claim Nos. 5, 44 and 43) until the said Senior Creditors received full payment of the unpaid balance of

*Exhibit E Annexed to the Affidavit of William E. Kelly*

principal on said Senior Debt with interest thereon to January 13, 1969 and thereafter shall be paid to the Bankers Life Company on its claim (Claim No. 1) based upon Subordinated Debt until the unpaid balance of principal on such Subordinated Debt with interest thereon, to January 13, 1969, shall have been paid in full, and it is further

ORDERED, that the granting of the Trustee's application on the terms hereinabove set forth is without prejudice to further application that may be made by the Trustee for an order subordinating payment of the claims filed by the Subordinated and Junior Subordinated Creditors to the payment of the claims filed by the Senior Creditors for the unpaid balance of principal on said Senior Debt with interest thereon to the date of payment and subordinating payment of the claims filed by the Junior Subordinated Creditors to the payment of the claim filed by the Subordinated Creditors for the unpaid balance of principal due on said Subordinated Debt, with interest to the date of payment.

Dated: New York, New York  
July 20th, 1970.

EDWARD J. RYAN

.....  
Referee in Bankruptcy



**Answer of Howard F. Sunshine, Trustee**

[SAME TITLE]

HOWARD F. SUNSHINE, Trustee of Kingsboro Mortgage Corporation by Weisman, Celler, Spett, Modlin & Wertheimer, his attorneys, answering the affidavit of William E. Kelly for Bankers Life Company:

1. Admits the allegations in paragraphs "1", "2" and "3".

2. Admits the allegations in paragraph "4" except denies that the claims of the Senior Creditors for post-petition interest will be paid from any of the assets of Kingsboro Mortgage Corporation.

3. Denies the allegations in paragraph "5" except that the trustee has been managing and disposing of the bankrupt estate.

4. Denies the allegations in paragraph "6" except admits that the claims of Senior Creditors are based upon the provisions of the agreement of April 17, 1964 and the notes (Exhibits "B", "C" and "D"), and reference to said agreement and notes is respectfully made for the terms and conditions thereof.

5. Denies the allegations in paragraphs "7" and "8".

WHEREFORE, it is respectfully requested that the motion of Bankers Life Company dated March 19, 1973 be denied.

Dated: New York, New York

April 13, 1973.

WEISMAN, CELLER, SPETT, MODLIN  
& WERTHEIMER

By: SAMUEL R. RUDEY,  
Samuel R. Rudey, A Partner  
Attorneys for Howard F. Sunshine,  
Trustee

Office & P. O. Address  
425 Park Avenue  
New York, New York 10022  
Phone: 371-5400

**Notice of Cross-Motion of  
Howard F. Sunshine, Trustee**

[SAME TITLE]

SIRS: -

PLEASE TAKE NOTICE that upon the annexed application of Howard F. Sunshine, Trustee herein, dated April 13, 1973, the undersigned will cross-move this court before the Honorable Edward J. Ryan, Referee in Bankruptcy, in Room 236 of the United States Courthouse, Foley Square, New York, on April 19, 1973 at 10:00 A.M., for an order:

(a) that the claim of Bankers Life Company (Claim No. 1) based upon Subordinated Debt be subordinated to the payment of the claims filed by Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company (Claims No. 5, 44 and 43) based upon Senior Debt until the said Senior Creditors have received payment in full of the unpaid balance of principal with interest thereon to the date of payment on said Senior Debt, and

(b) that any distributions or dividends to which said Bankers Life Company may be entitled on its claim (Claim No. 1) shall be paid to Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company pro rata according to their respective claims (Claims No. 5, 44 and 43) until the said Senior Creditors have received full payment of

*Notice of Cross-Motion of Howard F. Sunshine, Trustee*

the unpaid balance of principal with interest thereon to date of payment on said Senior Debt.

Yours, etc.,

WEISMAN, CELLER, SPETT, MODLIN  
& WERTHEIMER  
Attorneys for  
Howard F. Sunshine, Trustee

To:

CASEY, LANE & MITTENDORF  
Attorneys for Bankers Life  
Company

SIMPSON THACHER & BARTLETT  
Attorneys for Manufacturers  
Hanover Trust Company

**Application of Howard F. Sunshine, Trustee  
to Subordinate Claims**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To the Honorable Edward J. Ryan, Referee in Bankruptcy:

The application of Howard F. Sunshine by Weisman, Celler, Spett, Modlin & Wertheimer, his attorneys, respectfully represents:

1. That he is the Trustee herein, duly qualified and acting as such.
2. That a petition under Chapter XI of the Bankruptcy Act was filed herein by Kingsboro Mortgage Corporation on January 13, 1969 and thereafter said corporation was adjudicated a bankrupt on February 27, 1969.
3. That the bankrupt was engaged in the business of real estate mortgage financing and managed various parcels of property owned by it.
4. That during the course of these proceedings, Bankers Life Company filed a claim in the sum of \$1,881,075 for the unpaid balance of principal and interest due on two 5¾% Subordinated Notes issued by the bankrupt due April 1, 1976. (Claim No. 1)
5. That pursuant to the terms of the said 5¾% Subordinated Notes and the Agreement dated April 17, 1964 between Bankers Life Company and the bankrupt, as amended, the payment of principal and interest due on the said notes was subordinated to payment of principal and interest due on the Senior Funded Debt and Short-Term



*Application of Howard F. Sunshine, Trustee  
to Subordinate Claims*

Borrowing of the bankrupt referred to in said agreement as Senior Debt. Copies of the subordinated notes and agreement between the bankrupt and Bankers Life Company dated April 17, 1964 are annexed to the moving papers on behalf of Bankers Life Company.

6. By notice of motion dated June 2, 1970, application was made on behalf of the trustee to subordinate the claim of Bankers Life Company to the payment of the claims filed by Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company (Claims No. 5, 44 and 43) based upon Senior Debt until the said Senior Creditors have received payment in full of the unpaid balance of principal with interest thereon to the date of payment on said Senior Debt, and that any distributions or dividends to which Bankers Life Company may be entitled on its claim shall be paid to Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company pro rata according to their respective claims until the said Senior Creditors have received full payment of the unpaid balance of principal with interest thereon to date of payment on said Senior Debt.

7. After the said motion was served, Bankers Life Company, through its then attorneys, requested that the application relating to interest be deferred without prejudice until a later date and that the order to be entered thereon merely provide for interest to the date of the filing of the petition. The trustee consented thereto and on the return date of the motion, the court was apprised of the request. Accordingly, the order which was submitted provided that any distributions which Bankers Life may be entitled to

*Application of Howard F. Sunshine, Trustee  
to Subordinate Claims*

receive on its claim shall be paid to the said Senior Creditors until they have received full payment of the unpaid balance of principal on Senior Debt with interest to January 13, 1969 and that the granting of the trustee's application on said terms is without prejudice to further application that may be made for an order subordinating payment of the claims filed by the subordinated and junior subordinated creditors to the payment of the claims filed by the Senior Creditors for the unpaid balance of principal with interest to the date of payment.

8. By reason of the foregoing, the claim of Bankers Life Company constitutes a subordinated debt and should therefore be subordinated to the payment of the unpaid balance of principal and interest to date of payment of the claims filed by Manufacturers Hanover Trust Company (Claim No. 5), Northwestern National Life Insurance Company (Claim No. 44) and Farm Bureau Life Insurance Company (Claim No. 43) based upon Senior Debt.

9. Interim distributions have been paid to general unsecured creditors on claims which have been filed and allowed herein as follows:

Pursuant to order dated September 17, 1970	6 %
Pursuant to order dated March 8, 1971 .....	9 %
Pursuant to order dated October 28, 1971 ....	3½ %
Total .....	18½ %

10. There is no likelihood that general unsecured creditors will be paid from this estate the principal amount of their claims in full and certainly no interest accruing after the date of the filing of the petition will be paid on their claims.

*Application of Howard F. Sunshine, Trustee  
to Subordinate Claims*

WHEREFORE, your applicant respectfully requests that the motion of Bankers Life Company be denied and that the application of the trustee be granted as prayed for.

Dated: New York, N. Y.  
April 13, 1973.

WEISMAN, CELLER, SPETT, MODLIN  
& WERTHEIMER

By: SAMUEL R. RUDEY

Samuel R. Rudey  
A member of the Firm

Attorneys for Applicant

**Cross-Motion of Manufacturers Hanover  
Trust Company, Senior Creditor**

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Robert Schwartz, sworn to the 11th day of April, 1973, Manufacturers Hanover Trust Company will cross-move for an order subordinating payment of claim filed herein by Bankers Life Company (Claim No. 1) for the unpaid balance of the principal due to Manufacturers Hanover Trust Company from Kingsboro Mortgage Corporation (Subordinated Debt) with interest to the date of payment.

Dated: New York, New York  
April 11, 1973.

Yours, etc.

SIMPSON THACHER & BARTLETT  
Attorneys for Manufacturers  
Hanover Trust Company  
Office & P. O. Address  
One Battery Park Plaza  
New York, New York 10004  
483-900

To:

CASEY, LANE & MITTENDORF, ESQS.  
Attorneys for Bankers Life  
Company

WEISMAN, CELLER, ALLAN, SPETT &  
SHEINBERG, ESQS.  
Attorneys for Trustee



**Affidavit of Robert Schwartz in Support of Cross-Motion of Manufacturers Hanover Trust Company**

[SAME TITLE]

STATE OF NEW YORK        }  
COUNTY OF NEW YORK    } ss.:

ROBERT SCHWARTZ, being duly sworn, deposes and says:

1. I am an officer of Manufacturers Hanover Trust Company, to wit, an Associate Counsel.

2. By order dated July 20, 1970 Honorable Edward J. Ryan, Referee in Bankruptcy, granted the motion of the Trustee in Bankruptcy of Kingsboro Mortgage Corporation ("Kingsboro") for an order subordinating the claim of Bankers Life Company ("Bankers Life") based upon Subordinated Debt to the payment of claim filed by Manufacturers Hanover Trust Company ("Manufacturers") based upon Senior Debt until Manufacturers shall have received payment in full of the unpaid balance of principal on its claim, with interest thereon to January 13, 1969, without prejudice to a further application that may be made by the Trustee for an order subordinating payment of the claim filed by Bankers Life to payment of claims filed by Manufacturers and other Senior Creditors with the unpaid balance of principal on said Senior Debt with interest to the date of payment.

3. I am submitting this affidavit in opposition to the motion of Bankers Life for an order disallowing claim of Manufacturers based upon Senior Indebtedness, or, alternatively, subordinating the claim of Manufacturers to the extent that its claim seeks interest for any period after January 13, 1969, to Bankers Life's claim, which is based upon Subordinated Indebtedness.

*Affidavit of Robert Schwartz in Support or Cross-Motion of Manufacturers Hanover Trust Company*

4. Manufacturers has heretofore filed a claim in this proceeding in the sum of \$5,751,012.33 consisting of the principal amount in the sum of \$5,726,794.97 and interest on the unpaid amount of principal until January 13, 1969 amounting to \$24,217.36, which amount was due on the date of the filing of the petition herein. The Senior Debt owing to Manufacturers bears interest at the rate of 7 $\frac{1}{4}$ % until paid in full. Since the filing of the petition herein the principal amount due Manufacturers was reduced to 419,836.86, and in addition thereto there is due to Manufacturers interest on the unpaid amount of principal, which until April 1, 1971 amounts to \$990,341.39 and which will continue to accrue until Manufacturers shall have been paid in full out of dividends on its claim, as well as through its share of dividends paid on Bankers Life's claim.

5. As stated in the affidavit of William E. Kelly, sworn to the 19th day of March, 1973 and Exhibit E annexed thereto, the agreement of April 17, 1964 between Kingsboro Mortgage Corporation ("Kingsboro") and Bankers Life provides that in the event of any insolvency, bankruptcy, liquidation or other similar proceeding relative to Kingsboro, then all principal and interest on all Senior Debt shall first be paid in full before any payment on amount of principal or interest is made upon the Subordinated Notes upon which Bankers Life filed its claim. (underscored for emphasis)

6. I respectfully submit that Manufacturers' rights vis-a-vis Bankers Life are governed by the aforementioned agreement and that neither the Court nor Bankers Life may disavow its explicit provisions. In directing distribution of the bankrupt estate, the Bankruptcy Court merely

*Affidavit of Robert Schwartz in Support of Cross-Motion of Manufacturers Hanover Trust Company*

enforces the subordination agreement and orders distribution in accordance with the rights created thereby. Section 63 of the Bankruptcy Act which provides for filing of claims against the estate due as of the date of the filing of the petition, deals with debts of the bankrupt which may be proved against the estate. It has no application to the amounts which the Senior Creditor is entitled to receive upon a claim filed by a subordinated debtor, pursuant to a subordination agreement, which confers upon the Senior Creditor the right to receive payment on any claim of a Junior Creditor until the principal and interest due to the Senior Creditor shall have been paid in full.

7. There is no merit to the argument advanced by Bankers Life that to permit the Senior Creditors to recover post-petition interest would penalize Bankers Life for the length of time that it has taken to wind up Kingsboro's affairs, inasmuch as had Kingsboro's affairs been wound up earlier Senior Creditors would have been entitled to receive out of dividends payable to Bankers Life, the amount of interest on any Kingsboro's interest bearing senior indebtedness until maturity.

WHEREFORE, I respectfully ask that Banker's Life's motion be denied and that the order denying Bankers Life's motion provide for payment to Manufacturers of its pro rata share of the dividend payable on the claim filed herein by Bankers Life.

ROBERT SCHWALTZ

[Sworn to on April 11, 1973.]



**Proof of Claim of Manufacturers Hanover Trust  
Company Claim (No. 5) and Guarantee of Kingsboro  
Mortgage Corporation Attached Thereto**

MARTIN L. STEIN of No. 350 Park Avenue, in the City and County of New York, State of New York, says:

1. That he is an Assistant Vice-President of Manufacturers Hanover Trust Company, a corporation organized and existing under the laws of the State of New York, and carrying on business at No. 350 Park Avenue, City and County of New York, State of New York, and is duly authorized to make this proof of claim on its behalf. Said corporation is hereinafter designated as the claimant.

2. That the above named debtor was at and before the filing by it of the petition for an arrangement, and still is, justly and truly indebted to claimant in the sum of ~~\$5,807,611.36~~. \$5,751,012.33.

3. That the consideration of this debt is as follows: Claimant is the holder of promissory notes payable on demand, made by the abovenamed debtor and the holder of promissory notes payable on demand, made by corporations hereinafter named, the obligations of which corporations were guaranteed by the debtor by written instruments of guaranty dated November 21, 1967. The date of each note, the maker, the payee, the face amount, the unpaid principal balance and the amount of interest due and owing from each maker to the date of the filing of the petition is as follows: (Manufacturers Hanover Trust Company is hereinafter designated as MHT Co.).



*Proof of Claim of Manufacturers Hanover Trust Company  
Claim (No. 5) and Guarantee of Kingsboro Mortgage  
Corporation Attached Thereto*

MADE BY KINGSBORO MORTGAGE CORPORATION

<u>Date</u>	<u>Payee*</u>	<u>Face Amount</u>
10/ 2/67	MHTCo.	\$ 38,000
11/22/67	Bankers Trust Co.	95,000
9/29/67	First National City Bank	8,000
8/14/67	First National City Bank	75,000
10/ 2/67	First National City Bank	29,000
6/28/67	First National City Bank	350,000
9/18/67	First National City Bank	100,000
9/ 7/67	First National City Bank	75,000
11/22/67	First National City Bank	8,000
1/25/68	MHTCo.	15,000
1/29/68	MHTCo.	18,000
2/ 7/68	MHTCo.	15,000
2/13/68	MHTCo.	18,000
2/26/68	MHTCo.	14,000
3/ 4/68	MHTCo.	8,000
3/25/63	MHTCo.	29,000
4/ 2/68	MHTCo.	33,000
4/30/68	MHTCo.	52,000
		<hr/> \$ 980,000

MADE BY CONSTRUCTION MORTGAGEE CORP.

<u>Date</u>	<u>Payee*</u>	<u>Face Amount</u>
11/22/67	Bankers Trust Co.	\$ 625,000
11/22/67	Bankers Trust Co.	600,000
11/22/67	Bankers Trust Co.	50,000
11/22/67	Bankers Trust Co.	80,000
		<hr/> \$1,355,000

*Proof of Claim of Manufacturers Hanover Trust Company  
Claim (No. 5) and Guarantee of Kingsboro Mortgage  
Corporation Attached Thereto*

MADE BY BUILDERS MORTGAGEE CORP.

<u>Date</u>	<u>Payee*</u>	<u>Face Amount</u>
7/20/67	First National City Bank	\$ 50,000
8/17/67	First National City Bank	75,000
10/ 9/67	First National City Bank	50,000
10/27/67	MHTCo.	250,000
11/22/67	Bankers Trust Co.	50,000
11/22/67	Bankers Trust Co.	200,000
11/22/67	Bankers Trust Co.	300,000
11/22/67	Bankers Trust Co.	25,000
12/28/67	MHTCo.	36,000
		<hr/> \$1,036,000

MADE BY EMBAR FUNDING CORP.

<u>Date</u>	<u>Payee*</u>	<u>Face Amount</u>
9/12/67	MHTCo.	\$ 500,000
9/18/67	MHTCo.	16,000
9/18/67	First National City Bank	11,000
9/22/67	Bankers Trust Co.	100,000
11/22/67	Bankers Trust Co.	250,000
11/22/67	Bankers Trust Co.	13,000
11/22/67	Bankers Trust Co.	250,000
11/22/67	Bankers Trust Co.	25,000
12/28/67	MHTCo.	13,000
1/25/68	MHTCo.	15,000
2/13/68	MHTCo.	8,000
4/ 2/68	MHTCo.	17,000
		<hr/> \$1,218,000

*Proof of Claim of Manufacturers Hanover Trust Company  
Claim (No. 5) and Guarantee of Kingsboro Mortgage  
Corporation Attached Thereto*

MADE BY GALWAY FUNDING CORP.

<u>Date</u>	<u>Payee*</u>	<u>Face Amount</u>
10/16/67	First National City Bank	\$ 100,000
6/27/67	First National City Bank	125,000
7/ 7/67	First National City Bank	175,000
10/16/67	First National City Bank	25,000
12/28/67	MHTCo.	9,000
		<hr/> \$ 434,000

MADE BY LIBERTY MORTGAGEE CORP.

<u>Date</u>	<u>Payee*</u>	<u>Face Amount</u>
9/ 8/67	MHTCo.	\$ 350,000
6/21/67	First National City Bank	150,000
9/20/67	First National City Bank	20,000
9/20/67	MHTCo.	45,000
12/28/67	MHTCo.	38,000
		<hr/> \$ 603,000

MADE BY MANHATTAN MORTGAGEE CORP.

<u>Date</u>	<u>Payee*</u>	<u>Face Amount</u>
9/ 1/67	First National City Bank	\$ 525,000

MADE BY ADVANCE MORTGAGEE CORP.

<u>Date</u>	<u>Payee*</u>	<u>Face Amount</u>
8/ 3/67	MHTCo.	\$ 200,000
9/18/67	First National City Bank	200,000
9/18/67	First National City Bank	200,000
9/29/67	MHTCo.	350,000
12/28/67	MHTCo.	45,000
		<hr/> \$ 995,000

*Proof of Claim of Manufacturers Hanover Trust Company  
Claim (No. 5) and Guarantee of Kingsboro Mortgage  
Corporation Attached Thereto*

MADE BY OPERATORS MORTGAGEE CORP.

<u>Date</u>	<u>Payee*</u>	<u>Face Amount</u>
11/22/67	Bankers Trust Co.	\$ 400,000
9/ 8/67	First National City Bank	325,000
		<hr/> \$ 725,000
	Total (of notes)	<hr/> \$7,871,000

\* All notes made to Bankers Trust Company and to First National City Bank are endorsed to the order of MHTCo. without recourse.

The outstanding balances owed by each of the corporations are as follows:

Advance Mortgagee Corp. ....	\$ 654,000
Builders Mortgagee Corp. ....	896,273
Construction Mortgagee Corp. ....	1,125,815
Embar Funding Corp. ....	1,070,182
Galway Funding Corp. ....	424,000
Kingsboro Mortgage Corporation .....	644,081
Liberty Mortgagee Corp. ....	295,225
Operators Mortgagee Corp. ....	559,636
Manhattan Mortgagee Corp. ....	114,182
Total .....	<hr/> \$5,783,394

Interest has been paid by each of the corporations to December 25, 1968. Interest at  $7\frac{1}{4}\%$  on outstanding balances from December 25, 1968 to the dates of filings is as follows:

Advance Mortgagee Corp.

\$ 829,000 from 12/25/68 to 12/31/68 at $7\frac{1}{4}\%$ ,	
6 days .....	\$1,001.71
\$ 654,000 from 12/31/68 to 1/13/69 at $7\frac{1}{4}\%$ ,	
13 days .....	1,712.21
	<hr/> \$2,713.92



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*Proof of Claim of Manufacturers Hanover Trust Company  
Claim (No. 5) and Guarantee of Kingsboro Mortgage  
Corporation Attached Thereto*

Builders Mortgagee Corp.

\$ 896,273 from 12/25/68 to 1/17/69 at 7¼%,	
23 days .....	\$4,151.49

Construction Mortgagee Corp.

\$1,125,815 from 12/25/68 to 1/13/69 at 7¼%,	
19 days .....	\$4,307.81

Embar Funding Corp.

\$1,070,182 from 12/25/68 to 1/13/69 at 7¼%,	
19 days .....	\$4,094.93

Galway Funding Corp.

\$ 424,000 from 12/25/68 to 1/17/69 at 7¼%,	
23 days .....	\$1,963.94

Kingsboro Mortgage Corporation

\$ 724,081 from 12/25/68 to 12/27/68 at 7¼%,	
2 days .....	\$ 291.64
 \$ 644,081 from 12/27/68 to 1/13/69 at 7¼%,	
17 days .....	2,205.08
	<hr/>
	\$2,496.72

Liberty Mortgagee Corp.

\$ 295,225 from 12/25/68 to 1/17/69 at 7¼%	
23 days .....	\$1,367.47

Operators Mortgagee Corp.

\$ 559,636 from 12/25/68 to 1/17/69 at 7¼%,	
23 days .....	\$2,592.20

Manhattan Mortgagee Corp.

\$ 114,182 from 12/25/68 to 1/17/69 at 7¼%,	
23 days .....	\$ 528.88

The balance in debtor's account of \$6,160.19 has been set-off against the foregoing total sum due and owing.

4. That no part of the debt has been paid.

*Proof of Claim of Manufacturers Hanover Trust Company  
Claim (No. 5) and Guarantee of Kingsboro Mortgage  
Corporation Attached Thereto*

5. That there are no set-offs or counterclaims to the debt.

6. That claimant does not hold, and has not, nor has any person by claimant's order, or to undersigned's knowledge or belief, for claimant's use, had or received, any security or securities for the debt.

7. That the instruments upon which the debt is founded are attached hereto.

8. That no judgment has been rendered thereon.

Dated: New York, N. Y.

February 1st, 1969.

/s/ MARTIN L. STEIN

-----  
Martin L. Stein  
as Assistant Vice-President of  
Manufacturers Hanover Trust  
Company  
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GUARANTEE OF ALL LIABILITY AND SECURITY  
AGREEMENT

New York, November 21, 1967

In consideration of advances, loans, extensions of credit, renewals, acquisition of notes and other instruments for payment of money and any security documents relative thereto, security agreements or conditional contracts of sale, chattel mortgages, leases and other lien or security instruments, or an interest or participation therein, due or to become due, heretofore made to or for account of

*Proof of Claim of Manufacturers Hanover Trust Company  
Claim (No. 5) and Guarantee of Kingsboro Mortgage  
Corporation Attached Thereto*

SEE ATTACHED SCHEDULE

or any one or more of them jointly and/or severally (each, any and all of whom are hereinafter, for the purposes of this agreement, called "Borrower"), and/or now or hereafter to be made, directly or indirectly, to or for the account of or from Borrower by Manufacturers Hanover Trust Company (hereinafter called "Bank") and/or the granting to or for account of Borrower such extensions, forbearances, releases of collateral or other relinquishments of legal rights, and/or extending any other financial accommodation or benefit to Borrower, as Bank may deem advisable, the undersigned (each, any and all of whom are hereinafter called "Guarantor") hereby absolutely and unconditionally guarantees to Bank the prompt payment of claims of every nature and description of Bank against Borrower (including those arising out of or in any way connected with warranties made by Borrower to Bank in connection with any instrument deposited with or purchased by Bank) and any and every obligation and liability of Borrower to Bank or another or others of whatsoever nature and howsoever evidenced, whether now existing or hereafter incurred, originally contracted with Bank and/or with another or others and now or hereafter owing to or acquired in any manner, in whole or in part, by Bank, or in which Bank may acquire a participation, whether contracted by Borrower alone or jointly and/or severally with another or others, whether direct or indirect, absolute or contingent, secured or not secured, matured or not matured. (All of foregoing are hereinafter referred to as "Obligations").

Guarantor does hereby give to Bank a continuing lien for the amount of the obligations and liabilities of Guarantor hereunder, as well as for the payment of any and all other liabilities and obligations of Guarantor to Bank or another or others and claims of every nature and description of Bank against Guarantor, whether now existing or hereafter incurred, originally contracted with Bank and/or with

*Proof of Claim of Manufacturers Hanover Trust Company  
Claim (No. 5) and Guarantee of Kingsboro Mortgage  
Corporation Attached Thereto*

another or others and now or hereafter owing to or acquired in any manner in whole or in part by Bank or in which Bank may acquire a participation, whether contracted by Guarantor alone or jointly and/or severally with another or others, direct or indirect, absolute or contingent, secured or not secured, matured or not matured (all of which are hereafter collectively called "Liabilities"), upon any and all moneys, securities and any and all other property of Guarantor and the proceeds thereof, now or hereafter actually or constructively held or received by or in transit in any manner to or from Bank, its correspondents or agents from or for Guarantor, whether for safekeeping, custody, pledge, transmission, collection or otherwise or coming into the possession of Bank in any way, or placed in any safe deposit box leased by Bank to Guarantor. Bank is also given a continuing lien and/or right of set-off for the amount of said Liabilities upon any and all deposits (general or special) and credits of Guarantor with, and any and all claims of Guarantor against, Bank at any time existing and Bank is hereby authorized at any time or times, without prior notice, to apply such deposits or credits, or any part thereof, to such Liabilities and in such amounts as Bank may elect, although said Liabilities may be contingent or unmatured, and whether the collateral security therefor is deemed adequate or not. (All of the foregoing, together with any property, now or hereafter, pledged, assigned, and transferred to or deposited with Bank or its agents by or for Guarantor or in which Bank shall otherwise be granted a security interest by or for the Guarantor to secure said Liabilities are hereinafter individually and collectively called "Collateral Security").

If Guarantor, as registered holder of Collateral Security, shall become entitled to receive or does receive any stock certificate, option or right, whether as an addition to, in substitution of, or in exchange for, such Collateral Security, or otherwise, Guarantor agrees to accept same as Bank's agent and to hold same in trust for Bank, and to forthwith



*Proof of Claim of Manufacturers Hanover Trust Company  
Claim (No. 5) and Guarantee of Kingsboro Mortgage  
Corporation Attached Thereto*

deliver the same to Bank in the exact form received, with Guarantor's indorsement when necessary, to be held by Bank as Collateral Security.

Guarantor consents that Obligations or the liability of any other guarantor, surety, indemnitor, indorser, or any other party for or upon said Obligations or said Collateral Security may, from time to time in whole or in part, be renewed, extended, modified, accelerated, compromised, settled or released by Bank, and that any Collateral Security, liens for said Obligations or any right of set-off may, from time to time, in whole or in part, be exchanged, sold, released, surrendered or otherwise dealt with by Bank, and that Bank may refuse payment, in whole or in part, from any party to Obligations, all without any notice to, or further assent by, or any reservation of rights against, Guarantor and without in any way effecting or releasing the liability of Guarantor hereunder, Bank shall not be liable for failure to collect or realize upon Obligations or upon Collateral Security, or any part thereof, or for any delay in so doing, nor shall Bank be under any obligation to take any action whatsoever with regard thereto. Bank shall use reasonable care in the custody and preservation of Collateral Security in its possession but need not take any steps to preserve rights against prior parties or to keep the Collateral Security identifiable. Bank shall have no obligation to comply with any recording, re-recording, filing, re-filing or other legal requirement necessary to establish or maintain the validity, priority or enforceability of, or Bank's rights in and to, Collateral Security, or any part thereof. Bank or its nominee may exercise any right of the Guarantor with respect to any Collateral Security. In any statutory or non-statutory proceeding, affecting Guarantor or Collateral Security, Bank or its nominee may, whether or not a default exists and regardless of the amount of Obligations or Liabilities, file a proof of claim for the full amount of any Collateral Security and vote such claim for the full amount thereof: (a) for or against any proposal or resolution; (b)

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for a Trustee or Trustees or for a Committee of Creditors; (c) for the acceptance or rejection of any proposed arrangement, plan of reorganization, wage earners' plan, composition or extension, and Bank or its nominee may receive any payment or distribution and give acquittance therefor and may exchange or release Collateral Security. Any and all stocks, bonds or other securities held by the Bank hereunder may, without notice, and whether or not a default exists, be registered in the name of Bank or its nominee without disclosing that Bank is a pledgee; Bank (whether or not a default exists and regardless of the amount of the Obligations or Liabilities) or such nominee may, without notice, exercise all voting and corporate rights at any meeting of any corporation issuing such stocks, bonds or other securities, and exercise any and all rights of conversion, exchange, subscription or any other rights, privileges or options pertaining to such stocks, bonds or other securities as if the absolute owner thereof, including without limitation, the right to exchange, at its discretion, any and all of such stocks, bonds or other securities for other stocks, bonds, securities or any other property upon the merger, consolidation, reorganization, recapitalization or other readjustment of any corporation issuing the same or upon the exercise by the issuing corporation or bank of any right, privilege or option pertaining to such stocks, bonds or other securities, and in connection therewith, to deposit and deliver any and all of such stocks, bonds or other securities with any committee, trustee, depositary, transfer agent, registrar or other designated agency upon such terms and conditions as it may determine, all without liability except to account for property actually received by it. Bank shall have no duty to exercise any of the aforesaid rights, privileges or options and shall not be responsible for any failure to do so or delay in so doing. Guarantor hereby authorizes Bank to sign and file financing statements at any time with respect to any Collateral Security without the signature of Guar-

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antor. Guarantor will, however, at any time on request of Bank, sign financing statements, trust receipts, security agreements or other agreements with respect to any Collateral Security. Upon the Guarantor's failure to do so, Bank is authorized as the agent of Guarantor to sign any such instrument. Guarantor agrees to pay all filing fees and to reimburse Bank for all costs and expenses of any kind incurred in any way in connection with the Collateral Security.

Bank may sell all or any part of the Collateral Security deposited or pledged for said Liabilities, although said Liabilities may be contingent or unmatured, whenever in its discretion Bank considers such sale necessary for its protection. Any such sale may be made in the manner herein-after provided, without prior demand for margin or additional margin or for payment on account or any other demands whatsoever; the making of any such demands, oral or written, in any one or more instances shall not establish a course of conduct or constitute a waiver of the right of Bank to sell said Collateral Security as herein provided or of the right of Bank to accelerate the maturity of Liabilities as herein provided.

If Guarantor shall fail to perform any agreement herein contained or contained in any security agreement or other agreement delivered by Guarantor to Bank or if default occurs in the punctual payment of any sum payable upon any of said Obligations or said Liabilities or said Collateral Security, or if any of the following events occurs with respect to the Guarantor or Borrower or any obligor, maker, indorser, acceptor, surety or guarantor of, or any other party to, said Obligations or Liabilities or Collateral Security (each and all of whom are included in the term "them" as hereinafter used in this paragraph): default in respect of any liabilities, obligations or agreements (present or future, absolute or contingent, secured or unsecured, matured or unmatured, joint or several, original or acquired) of any of them to or with Bank; death (being an



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individual) or dissolution (being a partnership or corporation); death or suspension of the usual business activities of any member of any partnership included in the term "them"; insolvency, or if insolvency be imminent or threatened; commission of an act of bankruptcy; assignment for the benefit of creditors; calling a meeting of any creditors; appointment of a committee of any creditors or a liquidating agent; offering to or receiving from any creditors a composition or extension of any of the indebtedness of any of them; making, or sending a notice of an intended, bulk transfer; granting a security interest in any property, including without limitation, in the rights of any of them in Collateral Security; suspension of payments; the whole or partial suspension or liquidation of their usual business; failure, after demand, to furnish any financial information or to permit inspection of books or records of account; making any misrepresentation to Bank for the purpose of obtaining credit or an extension of credit; failure to pay any tax or failure to withhold, collect or remit any tax or tax deficiency when assessed or due; failure to pay when due any obligations whether in writing or not, commencement of any proceeding, suit or action (at law, or in equity, or under any of the provisions of the Bankruptcy Act or amendments thereto) for adjudication as a bankrupt, reorganization, composition, extension, arrangement, wage earners' plan, receivership, liquidation or dissolution by or against any of them; application for the appointment, or the appointment in any jurisdiction, at law or in equity, of any receiver, conservator, rehabilitator or similar officer or committee of, or of any of the property of, any of them; making of any tax assessment by the United States or any state; entry of a judgment or issuance of an order of attachment or an injunction against, or against any of the property of, any of them; commencement against any of them of any proceeding for enforcement of a money judgment under Article 52 of the New York Civil Practice Law and



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Rules or amendments thereto; failure of any of them or of Obligations, Liabilities or Collateral Security at any time to comply with Regulation U of the Federal Reserve Board or any amendments thereto; or if at any time, in the opinion of Bank, the financial responsibility of any of them shall become impaired, then, in any of those events, said Liabilities, although not yet due, shall without notice or demand, forthwith become and be immediately due and payable, notwithstanding any time or credit allowed under any of the Liabilities or under any instrument evidencing the same.

Upon the happening of any of the events hereinabove set forth, and at any time thereafter, Bank shall have, in addition to all other rights and remedies, the remedies of a secured party under the New York Uniform Commercial Code. Guarantor shall, upon request of Bank, assemble the Collateral Security and make it available to Bank at a place to be designated by Bank which is reasonably convenient to Bank and Guarantor. Bank will give Guarantor notice of the time and place of any public sale of the Collateral Security or of the time after which any private sale or any other intended disposition thereof is to be made by sending notice, as provided below, at least five days before the time of the sale or disposition, which provisions for notice Guarantor and Bank agree are reasonable. No such notice need be given by Bank with respect to Collateral Security which is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.

Bank may apply the net proceeds of any sale, lease or other disposition of Collateral Security after deducting all costs and expenses of every kind incurred therein or incidental to the retaking, holding, preparing for sale, selling, leasing or the like of said Collateral Security or in any way relating to the rights of Bank thereunder, including attorney's fees of 15% of the gross proceeds if an attorney is used to realize on the Collateral Security and legal expenses, to the payment, in whole or in part, in such order

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as Bank may elect, of one or more of said Liabilities, whether due or not due, absolute or contingent, making proper rebate for interest or discount on items not then due, and only after so applying such net proceeds and after the payment by Bank of any other amounts required by any existing or future provision of law (including Section 9-504 (1) (c) of the Uniform Commercial Code of any jurisdiction in which any of the Collateral Security may at the time be located) need Bank account for the surplus, if any. Guarantor shall remain liable to Bank for the payment of any deficiency with legal interest.

Guarantor waives any and all notice of acceptance of this guarantee or the creation or accrual of any of said Obligations, or of any renewals or extensions thereof from time to time or of the reliance by Bank upon this guarantee. Obligations, and each of them, shall conclusively be presumed to have been created, contracted or incurred in reliance upon this guarantee and all dealings between Borrower and Bank shall likewise conclusively be presumed to have been had or consummated in reliance upon this guarantee. Guarantor waives protest, demand for payment, notice of default or nonpayment to or on Guarantor, Borrower or any other party liable for or upon any of said Obligations or Liabilities or Collateral Security. This guarantee shall be a continuing, absolute and unconditional guarantee of payment regardless of validity, regularity or enforceability of any of said Obligations or purported Obligations or the fact that a security interest or lien in any of the Collateral Security may not be granted to, conveyed to, or created in favor of, Bank or that Collateral Security may be subject to equities or defenses or claims in favor of others or may be invalid or defective in any way and for any reason including any action, or failure to act, by Bank. This guarantee shall continue in full force and effect notwithstanding the termination or revocation of any other guarantee of Obligations by any other co-guarantor thereof

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with respect to his liability as guarantor, any notice from Guarantor not to renew, extend or modify Obligations or any part thereof, the death, incapacity, dissolution of Guarantor, or increase, decrease or change in the partners of the Guarantor if it be a partnership, and shall be binding upon Guarantor and Guarantor's estate and the personal representatives, heirs and successors of Guarantor who shall, nevertheless, remain liable with respect to Obligations and any renewals or extensions thereof or liabilities arising out of same, and Bank shall have all the rights herein provided for as if no such event had occurred. Any payment on account of, or reacknowledgment of Obligations by Borrower, or any other party liable therefor shall be deemed to be made on behalf of Guarantor and shall serve to start anew the statutory period of limitations applicable to Obligations and Liabilities.

The execution and delivery hereafter to Bank by Guarantor of a new instrument of guarantee shall not terminate, supersede or cancel this instrument, unless expressly provided therein, and all rights and remedies of Bank hereunder or under any instrument of guarantee hereafter executed and delivered to Bank by Guarantor shall be cumulative and may be exercised singly or concurrently.

No executory agreement unless in writing and signed by Bank, and no course of dealing between Guarantor and Bank shall be effective to change or modify or to discharge in whole or in part this guarantee. No waiver of any rights or powers of Bank or consent by it shall be valid unless in writing signed by an authorized officer.

Any notice to Bank shall be deemed effective only if sent to and received at the branch, division or department of Bank conducting the transaction or transactions hereunder. Any notice to Guarantor shall be deemed sufficient if sent to Guarantor whose name appears first below to the last known address of such Guarantor appearing on the books of Bank. Each Guarantor hereby designates the one whose



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name appears first below as agent to receive notice hereunder on his or its behalf.

The term "Bank" as used throughout this guarantee shall be deemed to include Bank in all its branches, divisions and departments, any individual, partnership or corporation acting as nominee or agent for Bank, any corporation, the stock of which is owned or controlled, directly or indirectly, by Bank, and any indorsees, successors or assignees of Bank. The term "Borrower" and "Guarantor" as used throughout this instrument shall include the individual or individuals, association, partnership, or corporation named herein respectively as Borrower or Guarantor and (a) in the case of Borrower any successor individual or individuals, associations, partnership or corporation to which all or substantially all of the business or assets of said Borrower shall have been transferred, (b) in the case of a partnership Borrower or partnership Guarantor any general or limited partnership which shall have been created by reason of, or continued in existence after, the admission of any new partner or partners therein, or the dissolution of the existing partnership by, or the continuation thereof after the death, resignation, or other withdrawal of any partner, and (c) in the case of a corporate Borrower or Guarantor, any other corporation into or with which said Borrower or Guarantor shall have or has been merged, consolidated, reorganized, or absorbed.

Guarantor agrees that, whenever an attorney is used to obtain payment under or otherwise enforce this guarantee or to enforce, declare or adjudicate any rights or obligations under this guarantee or with respect to Collateral Security, whether by suit or by any other means whatsoever, and attorney's fee of 15% of the principal and interest then due hereunder shall be payable by each Guarantor against whom this guarantee or any obligation or right hereunder is sought to be enforced, declared or adjudicated. Guarantor, if more than one, shall be jointly and severally bound and liable hereunder and if any of the undersigned



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is a partnership, also the members thereof individually. Bank and Guarantor, in any litigation (whether or not arising out of or relating to Obligations, Liabilities or Collateral Security or any of the matters contained in this guarantee) in which Bank and any of them shall be adverse parties, waive trial by jury and Guarantor in addition, waives the right to interpose any defense based upon any Statute of Limitations or any claim of laches and any set-off or counterclaim of any nature or description, and waives the performance of each and every condition precedent to which Guarantor might otherwise be entitled by law. Bank shall have the right to fill in any blank spaces left in this guarantee (including the name of "Borrower"), to date this guarantee and to correct patent errors therein. This guarantee shall be governed by and construed in accordance with the laws of the State of New York. Any provision hereof which may prove unenforceable under any law shall not affect the validity of any other provision hereof.

IN WITNESS WHEREOF, each of the undersigned has hereunto set his hand and his or its seal the day and year first above written, intending and declaring this to be a duly sealed instrument.

KINGSBORO MORTGAGE CORPORATION

..... (L. S.)

..... Address

..... (L. S.)

..... Address

..... (L. S.)

..... Address

Witness:

*Individual(s) Acknowledgment*

ETTA MARSCH

Commissioner of Deeds

City of New York 1-190

Certificate filed in New York County

Commission expires Apr. 11, 1968

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STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

On this 28th day of November, 1967, before me personally  
appeared .....  
to me known, and known to me to be the individual(s)  
described in and who executed the foregoing instrument  
and (t) (s) he (y) duly acknowledged to me that (t) (s) he  
(y) executed the same.

Notary Public  
.....

**Schedule of "Borrowers" Attached to Guarantee of  
all Liability in Favor of Manufacturers Hanover  
Trust Company Made by the Undersigned on Nov-  
ember 21, 1967**

Advance Mortgage Corp.  
Builders Mortgage Corp.  
Construction Mortgagee Corp.  
Embar Funding Corp.  
Galway Funding Corp.  
Liberty Mortgagee Corp.  
Manhattan Mortgagee Corp.  
Operators Mortgagee Corp.  
Pioneer Mortgagee Corp.  
Broadpark Realty Corp.  
Lavened Realty Corp.

KINGSBORO MORTGAGE CORPORATION

By .....

**Proofs of Claim of Northwestern Life Insurance Company and Farm Bureau Life Insurance Company, Senior Creditors**

Northwestern Life Insurance Company filed Claim No. 44 in the sum of \$430,754.48 consisting of principal amount of debt owing by Kingsboro Mortgage Corporation as of date of filing of petition and interest thereon to the date of petition.

Farm Bureau Life Insurance Company filed Claim No. 43 in the sum of \$258,368.56, principal amount of debt owing by Kingsboro Mortgage Corporation as of date of filing of petition and interest thereon to the date of petition.



**Decision of Edward J. Ryan, Bankruptcy Judge**

Bankers Life Company which filed Claim No. 1 in these proceedings moves "... for an order that the claims filed by Manufacturers Hanover Trust Company, Northwestern Life Insurance Company and Farm Bureau Life Insurance Company (Claims Nos. 5, 44 and 43, respectively) based upon senior debt be disallowed or, in the alternative, be subordinated, to the extent that such claims seek interest for any period after the date of the filing of the petition in bankruptcy, January 13, 1969, to the payment of the claim filed by Bankers Life Company (Claim No. 1) based upon Subordinated Debt until Bankers Life Company has received payment in full of the unpaid balance of principal on its claim with interest thereon to January 13, 1969, in the total amount of \$1,881,075." By appropriate Answer, Howard F. Sunshine, the trustee in bankruptcy of Kingsboro Mortgage Corporation, puts the contentions of the movant in issue and by Application to Subordinate Claims, Mr. Sunshine prays "... for an order:

"(a) that the claim of Bankers Life Company (Claim No. 1) based upon Subordinated Debt be subordinated to the payment of the claims filed by Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company (Claims No. 5, 44 and 43) based upon Senior Debt until the said Senior Creditors have received payment in full of the unpaid balance of principal with interest thereon to the date of payment on said Senior Debt, and

"(b) that any distributions or dividends to which said Bankers Life Company may be entitled on its claim (Claim No. 1) shall be paid to Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company pro rata according

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to their respective claims (Claims No. 5, 44 and 43) until the said Senior Creditors have received full payment of the unpaid balance of principal with interest thereto to date of payment on said Senior Debt."

Manufacturers Hanover Trust Company, one of the respondents to the motion of Bankers Life Company, likewise meets that motion with a cross-motion "... for an order subordinating payment of claim filed herein by Bankers Life Company (Claim No. 1) for [sic (to?)] the unpaid balance of the principal due to Manufacturers Hanover Trust Company from Kingsboro Mortgage Corporation (Subordinated Debt) with interest to the date of payment."

The respondents do not quarrel with the statement of facts presented by Bankers Life Company and in the interest of expedition, that statement of facts is now quoted:

"The bankrupt herein, Kingsboro Mortgage Corporation ("Kingsboro") was in the business of real estate mortgage financing and management of real estate holdings. On January 13, 1969, Kingsboro filed a petition under Chapter XI of the Bankruptcy Act and was adjudicated a bankrupt on February 26, 1973.

"Bankers Life filed a claim in the amount of \$1,881,075 for the unpaid balance of principal and interest, to the date of bankruptcy, due on two 5¾% Subordinated Notes issued by Kingsboro. Copies of Kingsboro's claim and the notes on which it is based are annexed to the moving affidavit of William E. Kelly, sworn to March 19, 1973, as 'EXHIBIT A', 'EXHIBIT B' and 'EXHIBIT C', respectively. The Subordinated Notes were issued pursuant to an

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agreement ('EXHIBIT D' to the Kelly affidavit), dated April 17, 1964, between Kingsboro and Bankers Life.

"On June 2, 1970, the trustee in bankruptcy, Howard F. Sunshine, moved for an order subordinating Bankers Life's claim, as well as the claims of Northwestern Life Insurance Company and The Paul Revere Life Insurance Company (Claims Nos. 3 and 6, respectively), both of which are based on Junior Subordinated Notes, to the claims of Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company, and Farm Bureau Life Insurance Company (Claims Nos. 5, 44 and 43, respectively) ('the Senior Creditors'). The Senior Creditors are claiming approximately \$6,450,000 in principal and interest through the date of bankruptcy, and are also claiming interest from the date of the filing of the petition in bankruptcy through the date of actual payment ('post-petition interest').

"Although the trustee's motion originally requested subordination of Bankers Life's claim to not only the amount of the Senior Creditors' claims to principal and interest through the date of bankruptcy but also to their claim to post-petition interest, that motion was amended, pursuant to Bankers Life's request, to exclude post-petition interest. Thus, on July 20, 1970, the Referee in Bankruptcy, Honorable Edward J. Ryan, ordered Bankers Life's claim, as well as the claims of the Junior Subordinate Noteholders, subordinated to the Senior Creditors' claims to unpaid principal and interest to the date of bankruptcy. Referee Ryan's order also provided that it

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was without prejudice to the right of the trustee to apply at a later time for an order subordinating Bankers Life's claim to the Senior Creditors' Claims to post-petition interest. A copy of Referee Ryan's order is annexed to the Kelly affidavit as 'EXHIBIT E'.

"Since July 20, 1970, the trustee has been managing and disposing of the bankrupt estate and has practically paid off the full amount of the Senior Creditors' claims, exclusive of post-petition interest. Since the issue is now presented as to whether Bankers Life's claim or the Senior Creditors' claim to post-petition interest should be paid next, Bankers Life makes this motion for an order disallowing the Senior Creditors' claims to post-petition interest or subordinating them to Bankers Life's claim to principal and interest through the date of bankruptcy, January 13, 1969." Bankers Life Company's Memorandum of Law, pages 1-3.

The language of the subordination agreement, in pertinent part, is as follows:

"12. Subordination to Senior Debt. . . .

(b) In the event of any insolvency, liquidation, reorganization or other similar proceedings, or any receivership proceedings in connection therewith, relative to the Company or its creditors or its property, and in the event of any proceedings for voluntary liquidation, dissolution or other winding up of the Company, whether or not involving insolvency or bankruptcy proceedings, then all principal and interest on all Senior Debt shall first be paid in full, or such payment shall have been provided for,



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before any payment on account of principal or interest is made upon the Notes. . . .

(d) In any of the proceedings referred to in paragraph (b) above, any payment or distribution of any kind or character, whether in cash, property, stock or obligations which may be payable or deliverable in respect of the Notes shall be paid or delivered directly to the holders of Senior Debt for application in payment thereof, unless and until all principal and interest on all Senior Debt shall have been paid in full, . . .” Trustee’s Memorandum of Law, pages 2, 3.

Thus, a simply question of law is presented, whether this court of bankruptcy will enforce the agreement which provides for the subordination of the claim of Bankers Life Company.

The movant urges, in essence, that the senior creditors may not be allowed post petition interest because Section 63a(1) of the Bankruptcy Act restricts the proof of a claim founded upon a fixed liability to the principal amount thereof with any interest thereon which would have been recoverable at the time of the filing of the petition in bankruptcy. The movant also relies upon the general rule that, with certain very limited exceptions, the accrual of interest ceases as of the date of the filing of a petition in bankruptcy, citing *Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156 (1947).

Section 63a(1) of the Bankruptcy Act does not determine the instant controversy. Accepting only for purposes of discussion the validity of a contention that the senior creditors may not file a *proof of claim* in these proceedings for post-petition interest, the question then is whether when

*Decision of Edward J. Ryan, Bankruptcy Judge*

the senior debt with interest to the date of the petition has been paid in full, shall any dividend allocable to the claim of Bankers Life Company be paid to Bankers Life Company, or shall its clear contractual obligation to the respondents be satisfied, i.e., shall such dividend be paid over to the senior creditors on account of post-petition interest.

As the respondents show, the general rule is bottomed upon two considerations, viz., administrative convenience in winding up bankrupt estates (*City of New York v. Saper*, 336 U.S. 328 (1949)) and the basic unfairness of permitting interest on the debtor's obligations to accrue post-bankruptcy when the debtor is precluded by law from satisfying those obligations until the judicial process has attained such a posture that a distribution can be made (*Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1947)).

Those considerations are removed *toto coelo* from the issue here presented, namely, will an agreement not fundamentally unfair between competent contracting parties be enforced by this court which is governed by equitable considerations? The Court of Appeals for this Circuit has made abundantly clear that it is not the function of this court of bankruptcy to realign the rights or priorities of competent contracting parties. The bankruptcy court serves as a forum for the recognition of rights already acquired. Where the parties before the Court have agreed by lawful contractual arrangement how their affairs shall be settled in the event of insolvency, such agreement shall be enforced. *In re Credit Industrial Corp.*, 366 F.2d 402 (1966).

The subordination agreement, to the extent it is hereinabove quoted, clearly demonstrates that Bankers Life Corporation had in mind precisely the situation now before

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the Court, and it agreed that "... all principal and interest on all Senior Debt shall first be paid *in full*, ... before any payment on account of principal or interest is made upon the Notes. . . ." (emphasis supplied). No sound reason has been advanced by the movant why this language should not be given its obvious construction and effect. The motion of Bankers Life Company is denied; the cross-motions are granted. Settle an appropriate order.

Dated: New York, New York  
March 13, 1974.

/s/ EDWARD J. RYAN  
Bankruptcy Judge

**Order of Bankruptcy Judge Edward J. Ryan Denying  
the Motion of Bankers Life Company and Granting  
the Cross-Motions of Howard F. Sunshine, Trustee  
and Manufacturers Hanover Trust Company**

[SAME TITLE]

Bankers Life Company, having moved this Court for an order that the claims filed by Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company (Claim Nos. 5, 44 and 43, respectively) based upon Senior Debt be disallowed or, in the alternative, be subordinated to the extent that such claims seek interest for any period after the date of the filing of the petition in bankruptcy, January 13, 1969, to the payment of the claim filed by Bankers Life Company (Claim No. 1) based upon Subordinated Debt until Bankers Life Company has received payment in full of the unpaid balance of principal on its claim with interest thereon to January 13, 1969 in the total amount of \$1,881,075.00, and the trustee having answered and cross-moved for an order that the claim of Bankers Life Company be subordinated to the payment of the claims filed by Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company based upon Senior Debt until the said Senior Creditors have received payment in full of the unpaid balance of principal with interest thereon to the date of payment on said Senior Debt and that any distributions or dividends to which said Bankers Life Company may be entitled on its claim shall be paid to said Senior Creditors pro rata according to their respective claims until the said Senior Creditors have received full payment of the unpaid balance of principal with interest thereon to date of payment of said Senior Debt; and



*Order of Bankruptcy Judge Edward J. Ryan Denying the Motion of Bankers Life Company and Granting the Cross-Motions of Howard F. Sunshine Trustee and Manufacturers Hanover Trust Company*

Manufacturers Hanover Trust Company having cross-moved for an order subordinating payment of the claim filed by Bankers Life Company to the unpaid balance of the principal due to Manufacturers Hanover Trust Company from Kingsboro Mortgage Corporation with interest to the date of payment, and said motions having regularly come on to be heard.

Now, upon the motion of Bankers Life Company dated March 19, 1973, the affidavit of William E. Kelly sworn to March 19, 1973 and the exhibits annexed thereto, the answer of Howard F. Sunshine, Trustee, dated April 13, 1973, the notice of cross-motion and the application of Howard F. Sunshine, Trustee, dated April 13, 1973, the notice of cross-motion of Manufacturers Hanover Trust Company dated April 11, 1973 and the affidavit of Robert Schwartz sworn to April 11, 1973 annexed thereto, and after hearing Casey, Lane & Mittendorf, attorneys for Bankers Life Company, Weisman, Celler, Spett, Modlin & Wertheimer, attorneys for Trustee, and Simpson Thacher & Bartlett, attorneys for Manufacturers Hanover Company, and due deliberation having been had, it is, on motion of Weisman, Celler, Spett, Modlin & Wertheimer and Simpson Thacher & Bartlett.

ORDERED, that the motion of Bankers Life Company be and the same hereby is denied and the cross-motions of the Trustee and Manufacturers Hanover Trust Company be and the same hereby are granted, and it is further

ORDERED, that the claim of Bankers Life Company (Claim No. 1) based upon Subordinated Debt be subordinated to

*Order of Bankruptcy Judge Edward J. Ryan Denying the  
Motion of Bankers Life Company and Granting the Cross-  
Motions of Howard F. Sunshine Trustee and  
Manufacturers Hanover Trust Company*

the payments of the claims filed by Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company (Claim Nos. 5, 44 and 43) based upon Senior Debt until the said Senior Creditors have received payment in full of the unpaid balance of principal on said Senior Debt with interest thereon to the date of payment, and it is further

ORDERED, that any distributions or dividends to which the said Bankers Life Company may be entitled to receive from this estate on its claim (Claim No. 1) shall be paid to Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company and Farm Bureau Life Insurance Company pro rata according to their respective claims filed herein (Claim Nos. 5, 44 and 43) until the said Senior Creditors have received full payment of the unpaid balance of principal on said Senior Debt with interest thereon to the date of payment.

Dated: New York, N. Y.

March 25, 1974

EDWARD J. RYAN

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Bankruptcy Judge

**Opinion and Order of John M. Cannella, U.S.D.J.  
Reversing the Decision and Order of Bankruptcy  
Judge Edward J. Ryan**

[SAME TITLE]

CANNELLA, D. J.:

This appeal from a decision of Hon. Edward J. Ryan, Bankruptcy Judge, dated March 13, 1974 (summarized at CCH Bankr.L.Rep. ¶ 65,215) and an order subsequently entered thereon (March 25, 1974), raises the question of whether, pursuant to a valid contractual subordination agreement among creditors, certain senior unsecured creditors may recover "post-petition" interest on their indebtedness prior to and from any dividend allocable to those junior creditors which are party to the subordination agreement. The bankruptcy court answered this question in the affirmative. This Court does not agree and, in light of the recent decision of the Third Circuit in *In re Time Sales Finance Corp.*, 491 F.2d 841 (3 Cir. 1974), the decision below is reversed.<sup>1</sup>

The factual framework giving rise to the present appeal is not subject to dispute among the parties and is presented by Judge Ryan in such fashion as not to require further elaboration here.<sup>2</sup> Rather, the legal issue raised

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1. The Third Circuit rendered its decision in the *Time Sales* case on February 7 of this year, and that decision was first reported in the CCH Bankruptcy Law Reporter on March 8 (¶ 65,129). As is indicated above, Judge Ryan determined the instant matter on March 13, 1974, slightly over a month later and just five days after the decision was reported. Given the state of the record below, it is more than likely that the Bankruptcy Judge did not become aware of the *Time Sales* decision until after the order appealed from had been entered.

2. In the interests of clarity and in order that subsequent readers might better understand the facts giving rise to the present controversy, the Court recites, in pertinent part, the statement of facts con-

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tained in Judge Ryan's opinion at 4-6 (such statement being in fact one submitted by appellant to the bankruptcy court).

The bankrupt herein, Kingsboro Mortgage Corporation ("Kingsboro") was in the business of real estate mortgage financing and management of real estate holdings. On January 13, 1969, Kingsboro filed a petition under Chapter XI of the Bankruptcy Act and was adjudicated a bankrupt on February 26, 1973.

[Appellant] filed a claim in the amount of \$1,881,075 for the unpaid balance of principal and interest, to the date of bankruptcy, due on two 5¾% Subordinated Notes issued by Kingsboro. . . . The Subordinated Notes were issued pursuant to an agreement . . . dated April 17, 1964, between Kingsboro and [Appellant].

On June 2, 1970, the trustee in bankruptcy, Howard F. Sunshine, moved for an order subordinating [Appellant's] claim, as well as the claims of Northwestern Life Insurance Company and The Paul Revere Life Insurance Company (Claims Nos. 3 and 6, respectively), both of which are based on Junior Subordinated Notes, to the claims of Manufacturers Hanover Trust Company, Northwestern National Life Insurance Company, and Farm Bureau Life Insurance Company (Claims Nos. 5, 44 and 43, respectively) (the "Senior Creditors"). The Senior Creditors are claiming approximately \$6,450,000 in principal and interest through the date of bankruptcy, and are also claiming interest from the date of the filing of the petition in bankruptcy through the date of actual payment ("post-petition interest").

Although the trustee's motion originally requested subordination of [Appellant's] claim to not only the amount of the Senior Creditors claims to principal and interest through the date of Bankruptcy but also to their claim to post-petition interest, that motion was amended, pursuant to [Appellant's] request, to exclude post-petition interest. Thus, on July 20, 1970, the Referee in Bankruptcy, Honorable Edward J. Ryan, ordered [Appellant's] claim, as well as the claims of the Junior Subordinate Noteholders, subordinated to the Senior Creditors' claims to unpaid principal and interest to the date of bankruptcy. Referee Ryan's order also provided that it was without prejudice to the right of the trustee to apply at a later time for an order subordinating [Appellant's] claim to the Senior Creditors' Claims to post-petition interest. . . .

Since July 20, 1970, the trustee has been managing and disposing of the bankrupt estate and has practically paid off the full amount of the Senior Creditors' claims, exclusive of post-petition interest. Since the issue is now presented as to whether [Appellant's] claim or the Senior Creditors' claim to post-petition interest should be



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may be said to turn upon the effect to be given certain language contained in the subordination agreement, the pertinent portions of which serve as point of departure for the present inquiry.

12. Subordination to Senior Debt. . . .

(b) In the event of any insolvency, liquidation, reorganization or other similar proceedings, or any receivership proceedings in connection therewith, relative to the Company or its creditors or its property, and in the event of any proceedings for voluntary liquidation, dissolution or other winding up of the Company, whether or not involving insolvency or *bankruptcy proceedings*, then all principal and interest on all Senior Debt shall first be paid in full, or such payment shall have provided for, before any payment on account of principal or interest is made upon the Notes [junior debt]. . . .

(d) In any of the proceedings referred to in paragraph (b) above, any payment or distribution of any kind or character, whether in cash, property, stock or obligations which may be payable or deliverable in respect of the Notes shall be paid or delivered directly to the holders of Senior Debt for application in payment thereof, *unless and until all principal interest on all Senior Debt shall have been paid in full*. . . . [Emphasis added]<sup>3</sup>

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paid next, [Appellant] makes this motion for an order disallowing the Senior Creditors' claims to post-petition interest or subordinating them to [Appellant's] claim to principal and interest through the date of bankruptcy, January 13, 1969.

3. Judge Ryan's opinion at 6.

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Judge Ryan, in his determination of the matter, indicated that the aforesaid terms of the subordination agreement "clearly [demonstrate that appellant] had in mind precisely the situation now before the Court, and it agreed that ". . . all principal and interest on all Senior Debt shall first be paid *in full* . . . before any payment on account of principal and interest is made upon the Notes. . . ." <sup>4</sup> Upon such reasoning, the Judge concluded that "[n]o sound reason has been advanced by the [appellant] why this language should not be given its obvious construction and effect". <sup>5</sup>

In adopting this view, that an allowance of "post-petition" interest to appellee creditors was justified by the contract, the bankruptcy court rejected appellant's contention that Section 63(a)(1) of the Bankruptcy Act, 11 U.S.C. § 103(a)(1), <sup>6</sup> which restricts proofs of claim founded upon fixed liability to the principal amount of the obligation and any interest thereon which would have been recoverable at the time of the filing of the petition in bankruptcy, as well as those well recognized policy considerations which hold for the cessation of interest accrual as of the date of filing

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4. *Id.* at 9.

5. *Id.*

6. Section 63(a)(1) of the Bankruptcy Act, 11 U.S.C. § 103 (a)(1) provides, in relevant part:

(a) Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date. . . .

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the petition,<sup>7</sup> served to preclude the allowance of interest sought by the appellees.<sup>8</sup> Rather, the Judge found the rule stated by the Court of Appeals for this Circuit in *In re Credit Industrial Corp.*, 366 F.2d 402 (2 Cir. 1966), namely, that the "bankruptcy court, in order to effectuate its duty to do equity, must enforce lawful subordination agreements according to their terms and prevent junior creditors from receiving funds where they have 'explicitly agreed not to accept them' "<sup>9</sup> dispositive of this controversy.

For purposes of the instant appeal, this Court has no quarrel with this analysis of the applicable law.<sup>10</sup> De-

7. *S'ee, e.g., Nicholas v. United States*, 384 U.S. 678 (1966); *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1947); *Sexton v. Dreyfus*, 219 U.S. 339 (1911); *Columbia Aircraft v. United States*, 163 F.Supp. 932 (S.D.N.Y. 1958); 3A Collier, Bankruptcy ¶ 63.16[1] at 1855 *et seq.* (14 ed. 1972).

8. The courts have recognized certain exceptions to the general rule that interest does not accrue after the petition in bankruptcy is filed and have allowed "post-petition" interest where (1) the alleged bankrupt proves solvent; (2) the security held by the creditor as collateral produces income after the filing of the petition; and (3) the security is sufficient to pay interest as well as the principal of the claim. *United States v. Bass*, 271 F.2d 129, 130 (9 Cir. 1959). *See also, Columbia Aircraft Co. v. United States, supra*; *In re Lykens Hosiery Mills*, 141 F.Supp. 895, 897 (S.D.N.Y. 1956); 3A Collier, *supra*, at 1860 *et seq.* \*However, none of the above-stated exceptions are here applicable.

9. *See also*, discussion at 366 F.2d 407-410 (and the authorities cited therein); *Bird & Sons Sales Corp. v. Tobin*, 78 F.2d 371, 373 (8 Cir. 1935); 3A Collier, *supra*, ¶ 65.06 at 2294-2295; 6 Remington, Bankruptcy Law § 2874 at 484 *et seq.* (5 ed., Henderson 1952 and Supp. 1973, Hayes).

10. In this regard, this Court is in accord with the view expressed by the Court of Appeals for the Third Circuit in the *Time Sales* case, 491 F.2d at 845, namely:

[w]hen we are confronted with an instrument that satisfactorily indicates that subordinated creditors were put on notice that superior

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parture from Judge Ryan's view is necessitated only because the conclusion reached, that by the subordination agreement appellant "clearly demonstrat[ed]" an intent to allow senior unsecured creditors "post-petition" interest prior to and out of any dividend allocable to it, misconceives the thrust of the relevant decisional authority.

Squarely in point is the recent decision of the Court of Appeals for the Third Circuit in *In re Time Sales Finance Corp., supra*. In that case, the Court of Appeals affirmed the district court's denial of "post-petition" interest to senior creditors predicated upon a subordination agreement almost identical to that at bar.

In the event of any liquidation, dissolution or winding up of the company or of any receivership, insolvency, bankruptcy, liquidation, readjustment, reorganization or other similar proceedings relative to the company or its creditors or its property, *all principal and interest owing on all superior indebtedness of the company shall be paid in full before any payment is made on the Five Year Debenture Notes*. . . . [Emphasis the Court's]<sup>11</sup>

Judge Adams, speaking for a unanimous court, stated the rationale for the *Time Sales* decision in these words:

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creditors may be entitled to interest up to the date of actual distribution . . . we may then be called upon to determine whether the language of section 63(a)(1) and the policies underpinning the Bankruptcy Act permit the payment of post-petition interest from the bankrupt's estate where some of the creditors have agreed to subordinate their claims against the bankrupt to those of other creditors.

11. 491 F.2d at 842.



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We need not decide, at this time, whether the narrow group of exceptions to the general rule that "everything stops" at the date the petition is filed is to be expanded to include the situation here. . . .

Instead, the district court's conclusion that the subordination provision contained in the debenture notes did not appropriately apprise the debenture note holders that their claims against the bankrupt would be subordinated to [the senior creditor's] demand for post-petition interest is not incorrect and, thus, is adequate to sustain its order denying [the senior creditor's] claim for post-petition interest. . . . *If a creditor desires to establish a right to post-petition interest and a concomitant reduction in the dividends due to subordinated creditors, the agreement should clearly show that the general rule that interest stops on the date of the filing of the petition is to be suspended, at least vis-a-vis these parties.* [Emphasis added]<sup>12</sup>

Rather than being in conflict with the decision of the Second Circuit in *In re Credit Industrial Corp.*, *supra*, as appellees contend, *Time Sales* is in complete accord with the rationale of that earlier case. As was stated, *supra*, *Credit Industrial* clearly stands for the proposition that lawful subordination agreements must be enforced in bankruptcy according to their terms and that junior creditors may not receive funds which they have "explicitly agreed not to accept". *Time Sales* does not deviate from this view nor does it exact a more stringent requirement in instances

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12. *Id.* at 844.

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such as at bar. The rule established by *Time Sales*, that before a right to "post-petition" interest and a concomitant reduction in dividends to subordinated creditors may be recognized, "the agreement should clearly show that the general rule that interest stops on the date of the filing of the petition is to be suspended, at least vis-a-vis these parties,"<sup>13</sup> is no more than a rule of "explicitness" wholly consistent with that enunciated in the *Credit Industrial* case.

On the record before it, this Court can not view the provisions contained in the subordination agreement, which are to the effect that no payment shall be made to the subordinated creditors "unless and until all principal and interest on all Senior Debt shall have been paid in full," when taken in a context of specific reference to "bankruptcy proceedings", as sufficiently clear and explicit as would preclude the operation of the general and accepted rule that "everything stops" on such date as the petition in bankruptcy is filed.<sup>14</sup> Upon the standard established in *Time Sales*, precise, explicit and unambiguous language must be contained in the subordination agreement to the effect that the contract abrogates the general rule regarding interest, in order that a right to "post-petition" interest prior to the payment of dividends to junior creditors may be established. Accordingly, the Court concludes that Judge Ryan erred in ruling that the contract at bar "clearly

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13. *Id.*

14. The Court finds that the language contained in the involved subordination agreement is not of such nature as would preclude an interpretation of "interest" as employed therein so as to mean such interest as is usually allowable in bankruptcy proceedings, that the general rule regarding interest would not be applied.

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demonstrates" an intent to allow payment of "post-petition" interest.

The decision and order of the bankruptcy court is reversed and the entry of an appropriate order is directed.

So ORDERED.

Dated: New York, N. Y.

July 31, 1974.

JOHN M. CANNELLA  
United States District Judge

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